**Wiss, a Division of Cooper Industries, Inc. *and* Patricia Salvagno**

**Local 262 of New Jersey, Retail, Wholesale and Department Store Union, AFL-CIO *and* Patricia Salvagno.** Cases 22-CA-10434 and 22-CB-4455

31 July 1984

## DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 29 September 1981 Administrative Law Judge Stanley N. Ohlbaum issued the attached decision. The Respondent filed exceptions and a supporting brief, on which the Respondent Union also relies.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent Union and the Respondent Company maintained and enforced an agreement that grants superseniority to union executive board members with respect to layoff and recall, and that the Respondent Union and the Respondent Company violated the Act by enforcing the agreement with respect to employee Ann Clark,[1] an executive board member of the Respondent Union.

The facts, set out in more detail in the judge's decision, center on a 1973 agreement between the Respondent Union and the Respondent Company.[2] The agreement provides, in pertinent part, as follows: "[T]he three (3) Executive Board members in the Newark Plant . . . shall have top 'seniority' in their departments with respect to lay-off, and . . . with respect to overtime work . . . ." [3] The Respondent Union and the Respondent Company were also parties to a collective-bargaining agreement that bound them from October 1980 to October 1983. In early February 1980, Charles O'Shea was nominated for the position of "divisional representative." Prior to the election, however, Shea was terminated. The union president then appointed employee Ann Clark as divisional representative.

As divisional representative, Clark attended the bimonthly executive board meetings held at the union hall. Under the union constitution, the executive board was vested with responsibility for formulating and establishing an educational program for the Union. The testimony also establishes that the executive board also decided matters pertaining to charitable contributions and discipline for union members, and occasionally discussed whether a steward had correctly decided that a particular action should not be grieved. In addition, Clark participated in the October 1980 contract negotiations. Other than occasionally answering fellow employees' questions about the contract, there is no record evidence that Clark was involved in contract administration or enforcement. Nor did she participate in grievance processing. During a fall 1980 reduction in force, the Respondent Company laid off Patricia Salvagno, despite her seniority over Ann Clark, because Clark as "divisional representative" was entitled to "superseniority" over Salvagno.

In *Gulton Electro-Voice*, 266 NLRB 406 (1983), enfd. sub nom. *Electrical Workers IUE Local 900 v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984), the Board reconsidered its treatment of superseniority granted to nonsteward union officers and announced that it would find lawful such superseniority provisions only to the extent that they apply to union officers who process grievances or perform other on-the-job contract administration functions, described as steward-like duties.

Here, as the judge found, the credited evidence establishes that employee Clark "had no official role in grievance processing" and "exercised no necessary or substantial role in contract administration or enforcement." Therefore, under *Gulton*, we find that maintenance and enforcement of the 1973 agreement granting superseniority to executive board members was unlawful as applied to employee Ann Clark. Accordingly, we find that by applying the 1973 superseniority provision and according superseniority to executive board member Ann Clark, and thereby effectuating Patricia Salvagno's layoff out of order of seniority 14 November 1980, the Respondent Company discriminated against employees in violation of Section 8(a)(1) and (3) of

[1] The reference in par. 10 of the complaint to employee Ann Smith is an obvious error. The record is clear that the employee referred to is Ann Clark.

[2] The judge found that the 25 October 1980 collective-bargaining agreement between the Respondent Union and the Respondent Company superceded the 1973 agreement. In view of the express statement in the complaint that the superseniority agreement for executive board members was maintained and enforced since 11 January 1973, and a similarly worded stipulation by the parties, we do not agree with the judge's conclusion that the 1973 agreement had been superseded by the 1980 collective-bargaining agreement.

[3] As the judge noted at fn. 11, a provision providing superseniority with respect to overtime is presumptively violative of the Act. The Respondents neither advanced a claim nor offered proof as to any necessity for such a provision.

the Act, and the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act.[4]

## THE REMEDY

Having found that the Respondents engaged in certain unfair labor practices, we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

We have found that the Respondents violated the Act by unlawfully applying the superseniority provision of the 1973 agreement in derogation of senior employee Patricia Salvagno's rights. Consequently, we shall order that the Respondent Company offer to reinstate Patricia Salvagno, that the Respondent Union notify the Respondent Company that it has no objections to reinstating Salvagno, and that the Respondents jointly and severally make her whole for any loss of earnings she may have sustained as a result of the discrimination against her. We shall also order that the Respondent Company remove from its files any reference to the unlawful layoff, and shall notify Patricia Salvagno that this has been done and that the unlawful layoff will not be used as a basis for future personnel actions against her. Backpay shall be computed in the manner the Board established in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Also, in order to remedy in full the effects of the Respondents' unlawful conduct, the Respondent Company's backpay obligation shall run from the effective date of the discrimination against Patricia Salvagno to the time it makes a recall offer, while the Respondent Union's obligation shall run from such effective date to 5 days after the date of its notification to the Respondent Company that it has no objection to the recall of Patricia Salvagno. Finally, we shall order that the Respondent Company cease and desist from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, and that the Respondent Union likewise cease and desist from restraining or coercing employees it represents from exercising those same rights.

## CONCLUSIONS OF LAW

1. Wiss, a Division of Cooper Industries, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By applying a seniority clause in a 1973 agreement which resulted in according superseniority to executive board member Ann Clark, the Respondent Company and the Respondent Union have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the Act, respectively, and by discriminating against unit employee Patricia Salvagno, when the Respondent Company laid her off at a time when she would not have been if the 1973 agreement had not accorded Ann Clark superseniority, the Respondents engaged in further violations of the foregoing sections of the Act.

4. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## ORDER

The National Labor Relations Board hereby orders that

A. The Respondent Company, Wiss, a Division of Cooper Industries, Inc., Newark, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Applying the 1973 agreement with the Respondent Union, Local 262 of New Jersey, Retail, Wholesale and Department Store Union, AFL-CIO, concerning layoff and recall so as to accord executive board member Ann Clark superseniority with respect to such matters.

(b) Discriminating against any employees by laying them off instead of executive board member Ann Clark when such employees have greater seniority in terms of length of employment than has Ann Clark.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with the Respondent Union make unit employee Patricia Salvagno whole for any loss of earnings she may have suffered as a result of the discrimination against her, such earnings to be determined in the manner set forth in the section of this decision entitled "The Remedy," and offer her immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

[4] Because the complaint alleged only that the application of the superseniority clause to Clark violated the Act, we find it unnecessary to determine whether the mere maintenance of the superseniority clause violated the Act.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Remove from its files any reference to the layoff of Patricia Salvagno and notify her in writing that this has been done and that evidence of the unlawful layoff will not be used as a basis for future personnel actions against her.

(d) Post at its establishment in Newark, New Jersey, copies of the attached notice marked "Appendix A."[5] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent Company's authorized representative, shall be posted by the Respondent Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Company to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Post at the same places and under the same conditions as set forth in paragraph A,2,(d), above, as soon as forwarded by the Regional Director, copies of the attached notice marked "Appendix B."

(f) Mail signed copies of the attached notice marked "Appendix A" to the Regional Director for Region 22 for posting by the Respondent Union.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Company has taken to comply.

B. The Respondent Union, Local 262 of New Jersey, Retail, Wholesale and Department Store Union, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Applying the 1973 agreement with the Respondent Company, Wiss, a Division of Cooper Industries, Inc., concerning layoff and recall so as to accord executive board member Ann Clark superseniority with respect to such matters.

(b) Causing or attempting to cause the Respondent Company to discriminate against employees in violation of Section 8(a)(3) of the Act.

(c) In any like or related manner restraining or coercing employees of the Respondent Company in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with the Respondent Company make Patricia Salvagno whole for any loss of earnings she may have suffered by reason of the discrimination against her, such lost earnings to be determined in the manner set forth in the section of this decision entitled "The Remedy."

(b) Notify the Respondent Company in writing that it has no objection to reinstating Patricia Salvagno, who but for the unlawful assignment of superseniority would not have been laid off.

(c) Remove from its files any reference to the layoff of Patricia Salvagno, and notify her in writing that this has been done and that evidence of the unlawful layoff shall not be used as a basis for future actions against her.

(d) Post at its office and meeting halls used by or frequented by its members and employees it represents at the Respondent Company's Newark, New Jersey facility copies of the attached notice marked "Appendix B."[6] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to above-described members and employees are customarily posted. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Post at the same places and under the same conditions as set forth in paragraph B,2,(d), above, as soon as forwarded by the Regional Director, copies of the attached notice marked "Appendix A."

(f) Mail signed copies of the attached notice marked "Appendix B" to the Regional Director for Region 22 for posting by the Respondent Company.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Union has taken to comply.

[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[6] See fn. 5, supra.

## APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT apply any clause in our 1973 agreement with Local 262 of New Jersey, Retail, Wholesale and Department Store Union, AFL-CIO so as to accord executive board member Ann Clark superseniority with respect to layoff or recall.

WE WILL NOT discriminate against any employees by laying them off instead of executive board member Ann Clark when she does not in fact have top seniority in terms of length of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Patricia Salvagno immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL jointly and severally with the Union make Patricia Salvagno whole for any loss of earnings she may have suffered as a result of the discrimination against her, with interest.

WE WILL notify Patricia Salvagno that we have removed from our files any reference to her layoff and that the layoff will not be used against her in any way.

WISS, A DIVISION OF COOPER INDUSTRIES, INC.

## APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT apply the 1973 agreement with Wiss, a Division of Cooper Industries, Inc. so as to accord executive board member Ann Clark superseniority with respect to layoff or recall.

WE WILL NOT cause or attempt to cause Wiss to discriminate against any employees by requiring that the 1973 agreement be applied so as to lay them off instead of executive board member Ann Clark when she does not in fact have top seniority in terms of length of employment.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify Wiss that we have no objection to reinstating Patricia Salvagno, who but for the unlawful assignment of superseniority would not have been laid off.

WE WILL jointly and severally with Wiss make Patricia Salvango whole for any loss of earnings she may have suffered as a result of the discrimination against her, with interest.

WE WILL remove from our files, and ask Wiss, a Division of Cooper Industries, Inc. to remove from its files, any reference to the layoff of Patricia Salvango and WE WILL notify her in writing that we have done so and that the layoff will not be used against her in any way.

LOCAL 262 OF NEW JERSEY, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO

## DECISION

### STATEMENT OF THE CASE

STANLEY N. OHLBAUM, Administrative Law Judge. This consolidated proceeding[1] under the National Labor Relations Act (29 U.S.C. § 151 et seq.) was litigated before me in Newark, New Jersey, on August 17-18, 1981, with all parties participating throughout by counsel[2] and afforded full opportunity to present evidence and arguments, as well as to file posttrial briefs which were received from all parties. Record and briefs have been carefully considered.

The basic issue presented is whether Respondents Employer and Union violated Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2), respectively, through according superseniority to an alleged member of the Union's executive board so as to displace from employment a more senior bargaining unit member.

On the entire record and my observation of the testimonial demeanor of the witnesses, I make the following

### FINDINGS AND CONCLUSIONS

#### I. JURISDICTION

At all material times, Respondent Wiss, a Division of Cooper Industries, Inc. (Employer), a Texas corporation, has been and is engaged at its Newark, New Jersey plant, the only facility involved in this proceeding, in the manufacture of scissors and related products. In the

[1] Consolidated complaint issued on December 30, growing out of charges filed on November 17, 1980; amended consolidated complaint issued on March 5, 1981.

[2] Charging Party by counsel for the General Counsel.

course and conduct of its said Newark business operations, in the representative 12-month period immediately preceding issuance of the complaint, Respondent Employer purchased, transferred, and caused to be delivered and transported to its said Newark plant, directly in interstate commerce from suppliers outside New Jersey, goods and materials valued in excess of $50,000.

I find that at all material times Respondent Employer has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and that at all of those times Respondent Union has been and is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

Respondent Employer has for many years had a collective-bargaining relationship with Respondent Union, their current collective-labor agreement being from October 1980 to October 1983. The bargaining unit is a conventional unit of production and maintenance employees, with the usual supervisory and other exclusions.

This case centers around a contest between Patricia Salvagno and Ann Clark over a job at Respondent Employer's Newark plant. Although Patricia Salvagno, as an employee senior to Ann Clark, was required under the subsisting collective agreement to be retained in the Employer's employ in case of a reduction in force, she was nevertheless laid off and Ann Clark retained. The justification advanced for this action, in seeming violation of the collective agreement (as well as the Act), is that, although Patricia Salvagno was senior, Ann Clark was invested with "*superseniority*" over Patricia Salvagno because Ann Clark had been *appointed* as a "divisional representative" (and thereby as an "executive board member") of Respondent Union by its president—contrary to the provisions of the Union's constitution requiring open nominations and secret-ballot elections by the membership, and contrary to the requests of the union chief steward and all other stewards, and further contrary to a "petition" to the union president that the Union's constitutional procedures for nomination and election be adhered to, but which the union president refused to do, insisting instead that he had the power and personally wished to appoint Ann Clark without nominations or election. The circumstances, in detail, are as follows.

Respondent Employer's work force has been undergoing substantial reduction, having dwindled during the past year from about 700 to around 130. When caught in the fall 1980 reduction in force, Patricia Salvagno was laid off; she protested that she had seniority over Ann Clark, who was being retained, and that she rather than Ann Clark was entitled to be retained under the requirements of the subsisting collective agreement. Although Patricia Salvagno was indeed senior to Ann Clark, she was nevertheless terminated and Ann Clark retained, Respondents Employer and Union taking the position that Ann Clark as an alleged "divisional representative" of the Union was entitled to "*super*seniority" over Patricia Salvagno.

The only "superseniority" provision in the subsisting collective agreement[3] is (emphasis added):

> *Stewards* shall have top seniority in their departments with respect to lay-off. The preference of the stewards with respect to Saturday overtime shall be applicable only if and when the same is permitted under the Rules and Regulations of the National Labor Relations Board and the determination of the Court of the applicable United States Federal Courts.

At the time here involved, the Union had 5 stewards, including a chief steward, for its 130 unit employees in Respondent's Newark plant. At no time was or is Ann Clark a steward.

Under the Union's constitution, nominations are required to be made and elections are required to be held each 2 years. The union constitutional provisions are (emphasis added):

> The General Executive Board shall consist of officers elected by the general membership and divisional representatives, *elected* from each division." [G.C. Exh 3, art. IV, sec. 1, p. 12.]
>
> Divisional representatives *shall* be *elected* from each division. [Id., sec. 3, p. 12.]
>
> The term of office for all members of the General Executive Board and Stewards shall be two (2) years. All terms of office shall commence on June 1st. [Id., sec. 4, p. 13.]
>
> The General Executive Board shall formulate and introduce an educational program for the Union. [Id., sec. 9, p. 14]
>
> Nominations for all officers *shall* take place during the months of January and/or February. Elections *shall* take place in the month of March. [Id., art. IX, sec. 1, p. 19.]
>
> All Balloting whether by Secret Ballot or Referendum, *must* be on uniform ballots *supplied by the Union office* and *must* be by *secret ballot vote.* [Id., sec. 3, p. 19.]
>
> [Although "The President may fill vacancies occurring in any office until the next election scheduled for such office" (id., sec. 2, p. 9), nowhere is any provision to be found authorizing him to eliminate, omit, suspend, or delay an election.]

These constitutional provisions may be changed *only* through stringent procedures spelled out in the constitution (id., art. XIII, p. 24) and not claimed to have been observed here.

In early February 1980, one Charles O'Shea was nominated for the position of "divisional representative." On February 15, still during the nominations period and well before the elections were to be held, O'Shea was terminated, under circumstances not here disclosed. Union President Braverman thereupon appointed Ann Clark as divisional representative at Respondent Employer's plant.

[3] G.C. Exh. 4. To be sure, another provision, dealt with infra, also refers to this.

When the Union's chief steward and all of the stewards there protested this action of Union President Braverman, asking that the Union's constitutional procedures for nomination and election be observed, Braverman refused. In protest against this high-handed action by Braverman, the chief steward and stewards engaged in a temporary token boycott of collective negotiation sessions then in progress, but to no avail. A petition to Braverman to adhere to the Union's constitutional requirements concerning nominations and elections was likewise rejected out of hand by Braverman, who insisted that he was "the president . . . and had the legal right to make any appointment that he so chose." All of the foregoing is uncontroverted by Braverman (who did not testify) or by anybody else.

It will have been noted that the superseniority provision of the subsisting collective agreement (supra) is explicitly limited to *stewards*. As has already been pointed out, at no time has Ann Clark been a steward. Indeed, in August 1980 Ann Clark (then already allegedly a divisional representative[4] by appointment of Braverman) was laid off for about a month, no superseniority or other basis then being advanced to spare her from that layoff.[5]

In support of Respondent's current contention that Ann Clark is now nevertheless entitled to superseniority here, Respondents have produced a document allegedly dated in January *1973* —almost 8 years prior to the subsisting collective agreement—purportedly entered into between a union business agent, Nicholas Gallicchio, and Respondent Employer's then director of employee relations, Burke Donahue, stating (R. Exh. 1):

> The three (3) Executive Board Members in the Newark Plant[6] and the two (2) Executive Board Members in the Maplewood Plant[7] shall have top "seniority" in their departments with respect to layoff, and they shall have preference with respect to overtime work[8] in the departments in which they work, provided they are capable, in the reasonable opinion of the Company, of performing the work as well as the regular operator.

Chief Union Steward Harrison E. Davis, whose testimony I credit, disclaims all knowledge of any such alleged 1973 document prior to the 1980 layoff of Patricia Salvagno here involved. Although the alleged 1973 document is inconsistent with the provision of the subsisting 1980 collective agreement (quoted supra) and was in any event clearly superseded by the latter, it is noted that the 1973 "agreement" was seemingly likewise "*nudum pactum*" since, again, purportedly made by a union representative lacking authority to do so and in a fashion wholly at odds with the explicit requirements of the Union constitution, which expressly provides (emphasis added):

> Collective bargaining in behalf of any membership group *shall* be conducted by the President and General Organizer and a negotiating committee. All contracts *must* be signed by them. [G.C. Exh. 3, art. XII, sec. 1, pp. 22-23.]
>
> The results of negotiations *shall* be *subject to ratification* by the *majority vote of the membership group immediately concerned.* [Id., sec. 2, p. 23]

As already pointed out, these constitutional requirements may not be changed except through rigorous procedures mandated by the constitution (id., art. XIII, p. 24) and not even claimed to have been observed here. However, regardless of whether the described 1973 document—here advanced by Respondents as sole support and justification for according superseniority to Ann Clark over Patricia Salvagno and as sole support and justification for the termination of Patricia Salvagno—was or was not valid when allegedly executed, it was clearly superseded by the bargained, subsisting 1980 collective agreement (quoted supra) and I so find. Since Respondents raise no basis other than the superseded alleged 1973 document to support their action in according Ann Clark "superseniority" so as to avoid Patricia Salvagno's conceded seniority and thereby to justify Patricia Salvagno's termination, it follows that that alleged basis for according Ann Clark "superseniority" must fail, thereby removing the only alleged justification for terminating Patricia Salvagno rather than Ann Clark.

Board law is that, although a contractual provision granting superseniority to a union steward as to layoff and recall is not violative of the Act since designed merely to promote efficient contract administration by assuring the steward's continuity in the post while on the job, a contractual provision granting a steward superseniority in other respects (e.g., job-bidding, overtime, etc.) is presumptively violative of the Act.[9]

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[4] As established by uncontroverted, credited testimony of Chief Steward Davis, Ann Clark was not the only divisional representative or executive board member laid off without application or contention of superseniority. So, too, were executive board members Yannuzzi and O'Shea, in 1979.

[5] It is uncontroverted that, following her return from this layoff, Ann Clark was not reappointed (nor nominated or elected) to the positon of divisional representative. It is Ann Clark's (and Respondent's) contention that during the period of her layoff she continued to hold, even though she did not function in, that capacity on behalf of the plant employees, even though not actually working at the plant but only technically an "employee" theoretically entitled to recall rights under appropriate circumstances.

[6] There are no longer three such members in the Newark plant.

[7] The Maplewood plant has since closed.

[8] That such a provision for "superseniority" beyond layoff/recall, and specifically with regard to preferential overtime, is presumptively violative of the Act, see discussion infra. No proof or even claim was here advanced as to any necessity for such a provision.

[9] *Dairylea Cooperative*, 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976). The rationale for the rule is that efficient administration of the collective agreement and effective servicing of the members of the bargaining unit would be hampered if not derailed by disruptive changes in the personnel essential to the carrying out of those functions; and that such consequences are avoided by insulating those essential persons against layoff through according them "superseniority" in that regard. However, the same consideration has not been thought, by a majority of the Board, to apply to other preferential benefits—such as bidding for promotion, transfer, or overtime—unless shown to be essential or substantially conducive to proper administration or necessary servicing of the collective agreement. See generally *Dairylea*, supra; *Teamsters Local 20 (Preston Trucking) v. NLRB*, 610 F.2d 991 (D.C. Cir. 1979) (contractual superseniority provision granting stewards preference in assignments of truck routes and vacation time *held* violative of the Act, since beyond layoff/recall and no justification established in terms of stewards' organi-

*Continued*

The Board has further held that permissible "superseniority" rights are not necessarily limited to those denominated "stewards," but may, under proper circumstances, extend to union officers essential to contract administration and effectuation.[10]

Here, however, it is to be noted that the bargaining unit in question, consisting of about 130 employees, is already served by no less than 5 stewards, including a chief steward; that Ann Clark, as "divisional representative," conceded that she had no official role in grievance processing, that being the exclusive province of the stewards;[11] that the credited evidence[12] establishes that Ann Clark exercised no necessary or substantial role in contract administration or enforcement, and none in grievance processing;[13] that, seemingly, there must be some limit on the number of union "officials" to be accorded "superseniority" so as to enable them automatically, through mere invocation of that talismanic word, to oust senior employees—whose interests they are intended to serve—from their hold on their jobs; that Ann Clark's alleged title to her union official capacity is tenuous at best, if indeed not wholly untenable, under the Union's constitution; and that, under the subsisting and applicable collective agreement, "superseniority" is expressly limited to *stewards*, with no power in any union official to change that without adhering to the constitutionally prescribed procedures including ratification by the unit members. If the Union (including, prominently and preeminently, its members) had desired to include, among the elaborately bargained provisions governing seniority in layoffs, a provision making "divisional representatives" of the Union superseniority beneficiaries in addition to the plenitude of union stewards, such a provision could readily have been included in the collective agree-

zational duties and responsibilities); *Liquid Carbonic Corp.*, 257 NLRB 686 (1981) (all-purpose contractual superseniority provision *held* violative, even if not enforced); *Complete Auto Transit*, 257 NLRB 630 (1981) (general all-purpose contractual superseniority provision *held* violative of Act); *Sheaffer Eaton Division of Textron*, 252 NLRB 1005 (1980) (contractual provision granting steward superseniority for layoff and "bumping" *held* not violative, even though it led to steward's "bumping" of senior employee in higher paid job); *American Can Co.*, 244 NLRB 736 (1979) (contractual superseniority provision granting preference in retention/recall of union trustees and guards *held* violative, in absence of proof that such officials were involved in "on-the-job" administration of the collective agreements or in grievance processing), enfd. 658 F.2d 746 (10th Cir. 1981); *A.P.A Transport Corp.*, 239 NLRB 1407 (1979) (mere maintenance, without implementation, of contractual superseniority provision not limited on its face to layoff/recall *held* presumptively violative of Act, notwithstanding its inclusion in collective agreements for 20 years; burden of showing justification, not here met, rests on party asserting propriety); *Industrial Workers AIW Local 148 (Allen Testproducts)*, 236 NLRB 1368 (1978) (contractual superseniority provision upheld for union financial secretary centrally involved in contract and labor affairs administration to a significant degree (3-2 decision)); *Connecticut Limousine Service*, 235 NLRB 1350 (1978) (all-purpose contractual superseniority provision *held* violative, even though not invoked by current stewards), enfd. as modified in regard to "shift preferences" on evidentiary showing sub nom. *NLRB v. Teamsters Local 443*, 600 F.2d 411 (2d Cir. 1979); *American Can Co.*, 235 NLRB 704 (1978) (contractual superseniority provision limited to layoff/recall held *"presumptively* lawful" (emphasis added) and not violative); *Allied Supermarkets*, 233 NLRB 535 (1977) (contractual superseniority provision not limited to layoff/recall *held* violative, even though stewards were elected and unit employees had approved of the superseniority provision); *Pattern Makers' Assn. of Detroit*, 233 NLRB 430 (1977), enfd. 622 F.2d 267 (6th Cir. 1980) (contractual superseniority provision, *"presumptively* valid" (233 NLRB 430, emphasis added) as to layoff/recall of stewards, *held* invalid as to former union officials as well as to current members of its executive committee having no relationship to contract administration); *Perfection Automotive Products*, 232 NLRB 690 (1977) (all-purpose contractual superseniority provision *held* violative, even though steward had seniority on his own and received no benefit from provision); *Otis Elevator Co.*, 231 NLRB 1128 (1977) (contractual superseniority provision *held* nonviolative where applied to prevent layoff of union officers who had through lateral "bumping" assumed duties of stewards whose jobs had been voluntarily eliminated by union to enable employer to retain employees with greater seniority); *Parker-Hannifin Corp.*, 231 NLRB 884 (1977) (extends *Dairylea* so as to sanction "bumping" rights by union stewards exercising contractual superseniority); *W. R. Grace & Co.*, 230 NLRB 259 (1977) (contractual provision granting stewards preferences in job and shift assignments and holiday overtime *held* violative in absence of showing by employer or union of justification, regardless of election of stewards by unit employees); *Auto Warehousers, Inc.*, 227 NLRB 628 (1976) (all-purpose contractual superseniority provision for stewards *held* violative as too broad, absent showing by employer or union of substantial justification, regardless of election of stewards by unit members), enf. denied 571 F.2d 860 (5th Cir. 1978) (extension of superseniority beyond layoff/recall, while presumptively invalid, is not continuingly per se invalid and violative of Act, and charge *held* time-barred); *Hospital Service Plan of New Jersey*, 227 NLRB 585 (1976) (contractual superseniority provision upheld to justify lateral "bumping" by steward of senior employee to avoid layoff); *Stage Employees IATSE Local 780 (McGregor-Werner, Inc.)*, 227 NLRB 558 (1976) (extends permissible superseniority to lateral bumping by stewards to another shift to avoid layoff); *Teamsters Local 671 (Connecticut Natural Gas)*, JD-558-80 (1980) (contractual superseniority provision for stewards, extending beyond layoff/recall, *held* violative of Act); *Westinghouse Electric Corp.*, JD-17-77 (1977) (contractual superseniority provision *held* not violative, even to extent of permitting steward to retain his job when other jobs in his department are eliminated); *Martin Marietta Aerospace*, JD-(SF)-39-76 (1976) (contractual superseniority provision preventing demotion of stewards as against demotion of more senior employees *held* violative in absence of showing of justification).

[10] *Expedient Services*, 231 NLRB 938 (1977); *Electrical Workers UE Local 223 (Limpco Mfg., Inc.)*, 230 NLRB 406 (1977), enfd. sub nom. *D'Amico v. NLRB*, 582 F.2d 820 (3d Cir. 1978).

[11] The fact that employees occasionally may have mentioned to or discussed with her some of their problems, gripes, or grievances does not establish any official capacity or role on her part in connection therewith; so could, and undoubtedly did, employees discuss such matters among themselves or with their family members or friends. Ann Clark conceded that at no time has she processed so much as a single grievance. However, Respondent Personnel Manager Jan-Marie Roth testified that employees having grievances have been referred by Ann Clark to *management* rather than to a union steward.

[12] I.e., testimony of Chief Steward Harrison E. Davis, an impressively forthright witness, whom, based on my close testimonial demeanor observations, I credit (even allowing for possible inconsistencies or errors in his testimony) in preference to Union Business Agent Nicholas Gallicchio (a visibly hostile, arrogant, and truculent, interested witness) and Ann Clark (a directly interested and less than candid witness, who attempted to tailor her testimony to her own benefit). Former Chief Steward Harrison E. Davis, on the other hand, was a cleancut and candid witness, with seemingly nothing directly at stake or to be gained by his testimony here, whose testimonial demeanor impressed me very favorably, and whose testimony on the whole, in essential aspects here substantially material, I credit. Comparing the testimonial demeanor of these witnesses as closely observed by me at the trial, I had no hesistancy in preferring by far the testimony of Davis, in aspects here decisive.

[13] Cf., e.g., *American Can Co.*, 244 NLRB 736 (1979), enfd. 658 F.2d 746 (10th Cir. 1981); *Pattern Makers' Assn. of Detroit*, 233 NLRB 430 (1977), enfd. 622 F.2d 267 (6th Cir. 1980). Under the reported cases (cf. also cases cited supra fn. 9), it would appear that mere participation in triennial or biennial collective negotiations (together with stewards and others) as here claimed by Ann Clark—as distinguished from *administration* of the collective agreement—is insufficient to warrant superseniority, at any rate in the absence, as here, of convincing proof of substantial justification.

ment; since it was not, it must be presumed that the Union and its members did not so intend.[14]

Finally, no contention has been here advanced by either of the Respondents justifying the application of "superseniority" to Ann Clark so as to justify the layoff of Patricia Salvagno, *on any basis other than the superseded 1973 document described above.* Certainly, as shown, it is not to be found in the superseniority provision of the currently subsisting and applicable collective agreement, which is limited to *stewards*, of whom Ann Clark has never been one. It will be recalled, moreover, that Ann Clark was herself in August 1980 (as also other "divisional representatives" in 1979) laid off, notwithstanding that she was then, too, a "divisional representative" and, as such, ex officio an executive board member, and that no assertion or claim of "superseniority" on her part was made at that time.[15] Moreover, although I have been unable to find a reported case, and none has been cited to me by counsel, in which a claim of superseniority was upheld or even asserted in the absence of a *contractual* provision to that effect, it is clear that to sanction such a claim in the absence of such a contractual provision, particularly in favor of a union "official" purportedly appointed as such by another union official contrary to the union's organic requirements of nomination and secret-ballot election, and also in defiance by the appointing union official of a petition from unit members that their constitutional requirements be adhered to, would condone and encourage favoritism and cronyism, nepotism, personal partisanship, freezing of union officials into office through their building up of a personally appointed "palace guard"[16] unresponsive to unit member's needs, overreaching, and even fraud on the part of union officials,[17] as well as illicit "sweetheart" arrangements between employers and unions in order to oust from their jobs senior but disfavored employees, contrary to the requirements of unit-ratified collective agreeements governing reduction in force (as here) in accordance with seniority.[18]

In view of the 5 stewards already serving the unit of 130 here, the explicit contractual limitation of superseniority to stewards alone, and the perhaps unusual if not unique configuration of other factors which have been described, it would not seem that the basic rationale of the *Dairylea* rule (supra at fn. 9) was intended to apply to a situation like that of Ann Clark under the circumstances shown, including her at least questionable official status under the Union's constitutional requirements, and considering the unfavorable impetus a contrary determination would give to the basic policies of the Act. It would accordingly seem that, under the circumstances shown, the *Dairylea* principle or presumption[19] is either inapplicable or should be deemed to be overcome. To conclude otherwise would be to legalize the ousting of a senior employee, in clear violation of a collective agreement, through sanctioning the improper or collusive designation of a junior employee as a "union official" in deliberate defiance of the Union's constitutional requirements. In this particular case, since the effect of Respondent Union's actions could not have been other than to "restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7"[20] (Sec. 8(b)(1)(A) of the act) and "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)" (id., Sec. 8(b)(2))[21] of the Act, and of Respondent Employer's actions to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" (id., Sec. 8(a)(3)) and "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7"[22] (id., Sec.

[14] Instead, the purported 1973 document to that effect—even though at best of highly doubtful validity or efficacy, and itself in part violative of the Act in its application to overtime—was expressly changed and superseded. This change cannot be ignored as being without intent and purpose, as reflected in the changed provision in the currently subsisting collective agreement limited to stewards instead.

[15] She now claims that she did not wish to do so since she wanted to be off anyway for personal reasons.

[16] Cf. Chairman Fanning, dissenting in *Complete Auto Transport*, 257 NLRB 630 (1981), calling attention to "no indication or suggestion of discrimination here in the selection of stewards" in the case.

[17] There is no indication as to whether Charging Party Patricia Salvagno or any other employee has complained to the U.S. Department of Labor concerning Respondent Union President Braverman's described failure to pursue or to permit adherence to the Union's constitutionally mandated nomination and election requirements, and his insistence upon what he considered to be his absolute personal right to *appoint* a divisional representative for 2 years (i.e., until at least the next required election, skipping the 1980 election even though there was time for nomination and election) notwithstanding a petition to him by union members to adhere to his Union's constitutionally prescribed nomination and election procedures; nor as to whether Patricia Salvagno has sought redress by civil suit against the Union under Secs. 301 and 302 of the Act, or for improper representation of her interests as a union member; nor as to whether Chief Union Steward Harrison E. Davis has filed a charge with the Board (or whether he has sought other redress) based on what he indicates was his summary termination from his own job because of his attempt to save Patricia Salvagno's job under the described circumstances, or for his presenting a petition to Braverman (which Braverman rejected out of hand) to adhere to the Union's constitutionally prescribed nomination and election procedures, or because of Davis' unsuccessful attempt to run against and unseat union general organizer Frank J. Smith from that job with the Union.

The matters described in the text cannot properly be regarded as solely of concern to the Secretary of Labor on the theory that they constitute no more than internal management or administration of the Union. Where, as here, they impinge on the rights of employees under the Act, the National Labor Relation Board is also concerned because of its statutory obligation to administer the Act. What greater impingement on an employee's rights under the Act can there be than his job termination by retaining in employment a junior employee favored by the union president with the Employer's collaboration, notwithstanding stringent layoff seniority provisions in a subsisting collective agreement? Such a matter, as the maintenance and enforcement of superseniority provisions generally in collective agreements, is very much the concern of the Board, as manifested in a plethora of reported cases in which it has dealt with such problems. See, e.g., cases cited supra at fn. 9.

[18] It is to be observed that, under the alleged 1973 "superseniority" provision invoked here on behalf of Ann Clark, she would even be entitled to "superseniority" over the chief steward and all stewards, directly contrary to the provisions of the subsisting collective agreement.

[19] So denominated (i.e., "presumption") by the Board in *American Can Co.*, 235 NLRB 704 (1978), and in *Pattern Makers' Assn. of Detroit*, 233 NLRB 430 (1977), enfd. 622 F.2d 267 (6th Cir. 1980).

[20] I.e., "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . the right to refrain from any or all such activities. . . ."

[21] I.e., Patricia Salvagno, through her termination, although senior to "superseniority"-accorded union "official" Ann Clark.

[22] Supra fn. 20.

8(a)(1)) of the Act, it is concluded that by engaging therein Respondent Union has violated and continues to violate Section 8(b)(1)(A) and (2), and that Respondent Employer has violated and continues to violate Section 8(a)(3) and (1), of the Act.

On the foregoing findings and the entire record, I state the following

## CONCLUSIONS OF LAW

A. Jurisdiction is properly asserted here.

B. Through its actions, found and described in section III, supra, in attempting to maintain and enforce an alleged agreement dated January 11, 1973, purporting to grant superseniority to union executive board members in the Newark, New Jersey plant of Respondent Employer Wiss, a Division of Cooper Industries, Inc.,[23] which purported agreement has been superseded by a collective agreement between Respondent Union and Respondent Employer dated October 25, 1980, and effective from that date through October 25, 1983, and through such enforcement to continue Respondent Employer's employee Ann Clark in her employment with Respondent Employer in preference to and so as to cause and continue the layoff since on or about November 14, 1980, of Respondent Employer's employee Patricia Salvagno, senior to said Ann Clark, and in violation of said subsisting collective agreement, Respondent Union has restrained and coerced employees in the exercise of rights guaranteed in Section 7, in continuing violation of Section 8(b)(l)(A) of the Act; and has, further, caused and continues to cause an employer to discriminate against an employee contrary to Section 8(a)(3), in violation of Section 8(b)(2) of the Act.

C. Through its actions found in section III, supra, under the circumstances there described, in purporting to enforce its aforesaid subsisting collective agreement so as to cause the preferential retention in Respondent Employer's employment of said Ann Clark, not a union steward or otherwise entitled to superseniority over Patricia Salvagno, an employee of Respondent Employer senior to Ann Clark, which Patricia Salvagno was by reason thereof laid off on or about November 14, 1980, and who has been continued in layoff status since then, Respondent Union has likewise violated and continues to violate Section 8(b)(1)(A) and (2) of the Act.

D. Through its actions, under the circumstances found and described in section III, supra, in attempting to maintain and enforce the aforesaid alleged agreement dated January 11, 1973, so as to lay off and continue the layoff of its employee Patricia Salvagno rather than its junior employee Ann Clark, under the circumstances hereinabove described and found, Respondent Employer has discriminated in regard to the hire or tenure of employment and the terms and conditions of employment of employees to encourage or discourage membership in a labor organization, in continuing violation of Section 8(a)(3) of the Act; and has, further, interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7, and continues so to do, in violation of Section 8(a)(1) of the Act

E. Through its actions, found in section III, supra, under the circumstances there described, in enforcing its aforesaid subsisting collective agreement so as to retain in its employ employee Ann Clark (not a union steward or otherwise entitled to superseniority under said collective agreement) in preference to senior employee Patricia Salvagno, and laying off and continuing in layoff status said Patricia Salvagno since on or about November 14, 1980, Respondent Employer has likewise violated and continues to violate Section 8(a)(3) and (1) of the Act.

F. Said violations, being unfair labor practices under the Act, have affected, are affecting, and, unless permanently restrained and enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Respondents, having been found to have violated the Act, should be required to cease and desist from those, as well as like or related, violations. They should additionally take the affirmative measures required in cases of this nature, including reinstatement of the employee wrongfully ousted from her job, together with a joint and several obligation for backpay with interest, computed as explicated by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977). The make-whole remedy to the ousted employee should encompass not only backpay, but also restoration of seniority and all benefits and entitlements lost by reason of the unlawful ouster, including lost vaction benefits if any, and also recompense for any expenses incurred by reason of any cancellation of health or other insurance policies or coverages attending her ouster. In brief, the ousted employee should in all respects be restored to the position and status she would have occupied if not unlawfully ousted from her job. Respondent Employer should be required to preserve and open its books and records to the Board's agents for backpay computation purposes, and both Respondents to make available their records for compliance determination purposes. Each Respondent should, finally, be required to post the Board's usual informational notice to members (Union) or notice to employees (Employer).

[Recommended Order omitted from publication.]

[23] Also denominated (answers) as J. Wiss & Sons Co., a division of Cooper Industries, Inc., and as Wiss Division of Cooper Industries, Inc. (current collective agreement, G.C. Exh. 4).